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No. 02-305

IN THE

Supreme Court of the United States

MIKE MOORE, Attorney General of the State of Mississippi and ERIC CLARK, Secretary of State of the State of Mississippi,
Petitioners,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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INTRODUCTION

The Respondent's Brief in Opposition offers no persuasive reason why the Fifth Circuit's unduly narrow version of express candidate advocacy under *Buckley*[1] and *MCFL*[2] should not be reviewed by the Court. On the contrary, the Respondent's Brief in Opposition is noteworthy primarily for what it does *not* say.

The Respondent does not—and could not—contend that the recurring issue presented by the Petition is not one of significant public importance[3] for a substantial number of states, see Pet. at 10-15, as they seek to properly apply state reporting and disclosure requirements for expenditures that are in fact "unambiguously campaign related." *Buckley*, 424 U.S. at 81. Twenty-two states and territories have now joined in an amici brief in support of review by this Court, observing, *inter alia*, that the First Amendment question is of "great national importance," Brief of Amici Curiae States at 2, and that the Fifth Circuit's interpretation requires state reporting statutes "to be confined so narrowly as to be essentially unenforceable as a practical matter." *Id.* at 4.

Similarly, the Respondent does not—and could not—challenge the Petitioners' assertion that the last decade has witnessed a dramatic and escalating use of expenditures for sham "issue" ads, unlimited in amount and not even reportable to the public under the Fifth Circuit's formulation, to promote

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[1] *Buckley v. Valeo*, 424 U.S. 1 (1976)

[2] *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)

[3] Indeed, in its application for attorneys' fees and expenses in the district court and its supporting memorandum, filed July 3, 2002, the Respondent and its attorneys variously assert that this was a "major case that was widely recognized as having nationwide implications . . . ." Mem. at 14, that the Fifth Circuit's "strong" opinion "will have broad future implications for political advertisers," Mem. at 16; and that its suit raised issues of "national scope." Application Ex. 3 at p. 4.

and defeat specific candidates. Pet. at 13-14. It cannot be reasonably disputed that the Fifth Circuit's unduly restrictive approach to express candidate advocacy contributes to that trend of escalation and circumvention. Indeed, Respondent itself views the Fifth Circuit decision as a springboard, claiming in the district court on remand that the Fifth Circuit's "strong opinion" will "have broad future implications for political advertisers." See Note 3, *supra*.

In addition, the Respondent does not--and could not--challenge the Petitioners' assertion that the Fifth Circuit's extreme version of the "magic words" test, on this record, renders state reporting and disclosure requirements meaningless, Pet. at 11-13, nor does it offer any commentary as to why the "First Amendment values" that are served by "opening the basic processes of our . . . election system to public view," *Buckley*, 424 U.S. at 82, are somehow unworthy of any protection or weight. Moreover, Respondent does not contend that the factual record here is not clear for purposes of review. It does not—and could not—contend that there are any jurisdictional or procedural obstacles which could make review of the merits problematical.

As discussed below, the arguments that are posed by Respondent in its Brief in Opposition do not upon inspection undercut any of the remaining points made in the Petition as to why review of the Fifth Circuit's judgment is plainly warranted.

ARGUMENT

1. The Fifth Circuit And The Ninth Circuit Are In Direct Conflict Over A First Amendment Issue Of National Importance.

In its Brief in Opposition, the Respondent contends that there is "no split among the circuits", Opp. at 6-7, and seeks to imply that lower courts are a happy family of one mind with the Fifth Circuit's extreme version of a "magic words"

test for express advocacy. The Fifth Circuit and the Ninth Circuit, however, are in direct conflict. As even a cursory examination of the Fifth Circuit decision reveals, and as the Opposition itself ultimately acknowledges, Opp. at 12, the Fifth Circuit explicitly and unequivocally rejects the Ninth Circuit rule, set forth in *FEC v. Furgatch*, 807 F.2d 857, (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), see App. at 10a, and that constitutes a "split" in the Circuits. Equally important, the Respondent never refutes the proposition that expenditures for these same four pro-candidate, pre-election television ads would be subject to reporting and disclosure in the states of the Ninth Circuit but that such disclosure for the ads may not be required in the states of the Fifth Circuit. This fact means that there is a square conflict in the Circuits on an important question of First Amendment law.

The Respondent asserts that the Petition somehow mischaracterizes the Fifth Circuit's standard for electoral advocacy as "narrow." Opp. at 10-11. The fact of the matter is that the Fifth Circuit opinion itself describes its reading of *Buckley* as "narrow," App. at 12a. Moreover, as acknowledged in the Petition, although several Courts of Appeal have indeed adopted a literal and restrictive "magic words" standard for express candidate advocacy, mainly in the context of facial challenges, no court has ever gone so far as to effectively jettison one of *Buckley* footnote 52's own "magic words" of express candidate advocacy—the use of candidate slogans or catch phrases such as "Smith for Congress"—as did the Fifth Circuit here. App. at 16a. On a record such as that presented here, where the pre-election television ads specifically identify the candidate, specifically name the office for which the candidate is running, and close with a candidate slogan or a catch phrase such as "A fair and independent voice for Mississippi," 51a, or "common sense on the bench," 52a, the Fifth Circuit is currently alone in holding that such explicit endorsements of a candidate cannot amount to express advocacy subject to disclosure

requirements. Respondent's claim that every Court of Appeals has "reached the same conclusion," Opp. at 13-17, is not correct.

Respondent's further argument that *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), is somehow inconsequential because it did not cite the almost simultaneously rendered decision in *MCFL*, Opp. at 13-17, proves exactly nothing. *Furgatch* remains good law in the Ninth Circuit and will so remain until overruled. There is a direct conflict with the Ninth Circuit as to a proper reading of *Buckley*, upon which *Furgatch* based its analysis. As found by the district court, and contrary to Respondent's contention, the decision in *MCFL*, fairly read, supports the Petitioners' position that the ads in question amount to express advocacy for a specific candidate.

2. State Courts Disagree With The Fifth Circuit's Unduly Narrow Rule Of Express Candidate Advocacy.

The Brief in Opposition asserts that review should be denied because the state courts do not need "guidance" or "require correction." Opp. at 7, 18-21. The fact of the matter is that each of the state court decisions cited by Petitioners in their Petition, Pet. at 21, rejects an unduly narrow "magic words" standard for express advocacy now espoused by the Fifth Circuit. Indeed, as the Brief in Opposition itself confirms, Opp. at 19 n.17, there is growing confusion and division in the state courts, spurred in part by the Fifth Circuit's decision in this case—thus affording an additional practical reason why this Court's review is warranted.

Respondent's current contention that state courts are essentially of one mind with the Fifth Circuit is directly contrary to the analysis of the Fifth Circuit itself and the district court, both of which recognized that there is a division of approach to express candidate advocacy in the state courts, see 8a and 36a.

Respondent claims that in *Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721 (Wisc.), *cert. denied*, 528 U.S. 969 (1999), the Wisconsin Supreme Court "refused to adopt the *Furgatch* standard." Opp. at 20. More to the point, however, is that a solid majority of that court, five of the six justices, in separate opinions, clearly rejected the extremely narrow "magic words" standard for express advocacy espoused by the Fifth Circuit and Respondent. These justices all agreed at a minimum that "no particular magic words" are necessary for a communication to constitute express advocacy."[4]

Similarly, in *Osterberg v. Peca*, 12 S.W.3d 31, 53 (Tex. 2000), the Texas Supreme Court, contrary to the position of Respondent and the Fifth Circuit, ruled that the Supreme Court in *MCFL* had moved beyond a rigid, unyielding standard of express candidate advocacy to recognize that an advertisement can amount to express advocacy based on an evaluation of the "essential nature" of an advertisement which goes beyond issue discussion.

Moreover, in *State ex rel Crumpton v. Keisling*, 982 P.2d 3 (Or. Ct. App. 1999), *review denied*, 994 P.2d 132 (2000), the state court directly adopted the *Furgatch* analysis for determining what amounts to express candidate advocacy.

In contrast, and as pointed out by the Opposition at 19 n. 17, other state courts, now relying upon, *inter alia*, the narrow formulation of the Fifth Circuit here, have adopted an absolutist approach to express candidate advocacy. *Eg.*, *Governor Gray Davis Committee v. American Taxpayers*

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[4] *Election Bd. of Wisconsin*, 597 N.W.2d at 731; *Id* at 738 (Bablitch, J., concurring); *Id.* at 739 (Bradley, J., dissenting). For an in depth discussion of this case and its various opinions as a microcosm of the current debate over the express advocacy standard, see David L. Anstaett, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity: Elections Board v. Wisconsin Manufacturers & Commerce*, 2000 Wis.L.Rev. 1117 (2000).

Alliance, 2002 WL 31116829 (Cal. App. 1 Dist.) (Sept. 25, 2002). The *Governor Gray Davis Committee* decision exacerbates the existing conflict because now the State of California faces inconsistent opinions on First Amendment law from two different courts. There is a plain and pressing need for guidance from this Court as to this division of approach to express advocacy.

3. The Petitioners Do Not Propose A Novel Or Totally "Subjective" Standard, And The Facts Of This Case Present A Concrete Record Upon Which To Give Needed Clarification to *Buckley* and *MCFL*.

The Respondent asserts that there is "no reason" for the Court to reconsider express advocacy under *Buckley*, which at bottom it views as rigidly confined to a footnote 52-based computer word search, and incorrectly claims that Petitioners propose a standard of express candidate advocacy that is too "subjective." Opp. at 7, 22-26. On this record, however, the Fifth Circuit's concededly "narrow" interpretation of *Buckley*, 10a, refuses to give any weight whatsoever to important considerations set forth in *Buckley* itself [5] and goes well beyond a fair reading and application of that case and *MCFL*. Indeed, as observed above, the *Buckley* Court recognized that using a candidate slogan or catch phrase such as "Smith for Congress" constitutes express electoral advocacy; by refusing to hold that an ad which identifies the candidate, identifies the office for which the candidate is running, and closes with candidate's name and the slogan "A fair and independent voice for Mississippi" amounts to express advocacy subject to

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[5] In *Buckley*, the Court spoke approvingly of disclosure requirements which would "shed the light of publicity on spending that is unambiguously campaign related." 424 U.S. at 81. The Court in *Buckley* and *MCFL* never could have envisioned that spending for these pre-election, entirely pro candidate television ads here would not be subject to state reporting and disclosure requirements.

disclosure, the Fifth Circuit eviscerates a part of *Buckley* and plainly departs from the "essential nature" analysis required by *MCFL*.

Moreover, contrary to Respondent's assertion, the Petition does not suggest, or need to suggest, a novel or totally "subjective" standard of express candidate advocacy. The plain and unmistakable content of the television advertisements here, taken as a whole and viewed with regard to the *objective and undeniable fact* of an election date set by law, amount to express candidate advocacy supporting and endorsing the specified candidates—even if the ad is somehow "marginally less direct" than, for example, "Vote for Prather." The Respondent's spending here was "unambiguously candidate related," 424 U.S. at 81, and, as the district court confirmed, "*no* reasonable viewer" could construe the ads otherwise, 42a (emphasis supplied), or as a mere discussion of issues which mention a candidate.

The Fifth Circuit's purportedly "objective" formulation favored by Respondent [6] is out of touch with the realities of modern political candidate advertising and would completely exclude from any disclosure unlimited "independent" spending for the most famous examples of candidate promotion in American history. Recent studies have demonstrated that in today's political world, *candidates' own advertisements*, which are by definition designed to mobilize and incite voter support at the polls for the candidate, rarely use the express words "vote for" or "vote against" or synonymous phrases. In the 1998 congressional elections, for example, 96% of the candidates' *own* television advertisements did not

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[6] Indeed, the Fifth Circuit's purportedly objective standard is not as "bright line" as Respondent contends, because there is always room for a semantical debate as to what constitutes the "other" explicit words exhorting voters to take specific electoral action. 13a.

use such phrases.[7] Accordingly, for the Fifth Circuit to absolutely exclude from disclosure unlimited expenditures for pre-election advertisements which omit a literal, verbal exhortation to vote for a candidate not only authorizes easy circumvention of state requirements by labor unions, corporations, and special interest groups, but also ignores the modern reality of candidate advertising. Moreover, Respondent cannot deny that the Fifth Circuit's formulation would exclude from disclosure spending for such direct expressions of endorsement and support for a candidate as "I Like Ike" and "LBJ for the USA," which can serve as the defining touchstone and rallying cry for a candidate's election campaign.

Evaluating the content of the pre-election advertisements here, taken as a whole, is not a "subjective" standard, and the facts of this case aptly demonstrate the problem with the Fifth Circuit's approach. Contrary to Respondent's contention, the Court in the facial challenge in *Buckley* (or in the as-applied challenge in *MCFL*) did not dictate that all common sense be left behind when an advertisement conveys a message that is unambiguously and unmistakably advocating the election of a specific declared candidate.[8]

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[7] See Jonathan S. Krasno and Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections*, Brennan Center for Justice (2000).

[8] Contrary to Respondent's further contention, Opp. at 25, there would be no need to rewrite Mississippi's statute, or any other state's "express advocacy" statute, to take advantage of a decision from this Court which explains that expenditures for the advertisement at issue here are subject to disclosure consistent with *Buckley* and *MCFL*. Petitioners have sought and continue to seek to apply the Mississippi "express advocacy" and disclosure statutes to the full extent of, and not in a manner narrower than, that permitted by this Court.

4. This Case Is Appropriately Considered On Its Merits In The Same Term As The BCRA Case.

In its Opposition, Respondent contends that this case would not be a good companion for the Court to consider at the same term as its review of the BCRA cases for federal elections. Opp. at 26. The circumstances regarding the two cases are outlined in the Petition at pp. 15-17 and will not be reiterated here. The Brief of Amici Curiae States Arizona, et al., discusses in detail why the merits of this case separately warrant consideration and why the Court will also benefit from considering the cases at the same term. *Id.* at 7-14. In view of the broad implications of the Fifth Circuit decision for states in judicial and other upcoming election races, and the distinct interests of the states in applying their election finance laws, this case on its own merits warrants an immediate grant of certiorari regardless of what other case is on the Court's docket. The similarity of the subject matter and the importance of both plainly indicate that there are certain advantages to considering the two cases on their merits in the same term, whether scheduled for oral argument in "tandem," as appropriately suggested by Amici States, or not.[9] There can be no reasonable argument that an immediate grant of certiorari in this case would serve no purpose, as Respondent seems to urge.

CONCLUSION

In the facial challenge in *Buckley*, and even in *MCFL*, now decided over fifteen years ago, the Court could not have envisioned today's state of affairs in which unlimited "independent" expenditures for advertisements that are entirely devoted to supporting or defeating a particular candidate—but yet are not reportable—are the predominant feature of the

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[9] Contrary to Respondent's contention, Petitioners did not, and do not, assert that the cases meet the requirements for a formal consolidation, or that they should be consolidated.

election finance landscape. Contrary to Respondent's contention, the boundaries of express advocacy as defined by the Fifth Circuit are not "settled law." This case presents an issue of national importance to the states upon which there is a pressing need for clarification and guidance from this Court. Review is warranted and Petitioners pray that it will be granted.

Respectfully submitted,

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